



## Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

17 November 2022\*

(Reference for a preliminary ruling – Environment – Waste – Directive 2008/98/EC – Point 1 of Article 3 – Article 5(1) – Article 6(1) – Excavated materials – Concepts of ‘waste’ and of ‘by-product’ – Cessation of waste status)

In Case C-238/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria, Austria), made by decision of 2 April 2021, received at the Court on 13 April 2021, in the proceedings

**Porr Bau GmbH**

v

**Bezirkshauptmannschaft Graz-Umgebung,**

THE COURT (First Chamber),

composed of A. Arabadjiev (Rapporteur), President of the Chamber, L. Bay Larsen, Vice-President of the Court, acting as Judge of the First Chamber, P.G. Xuereb, A. Kumin and I. Ziemele, Judges,

Advocate General: L. Medina,

Registrar: S. Beer, Administrator,

having regard to the written procedure and further to the hearing on 23 March 2022,

after considering the observations submitted on behalf of:

- Porr Bau GmbH, by M. Walcher, Rechtsanwalt,
- the Austrian Government, by F. Boldog, A. Kögl, A. Posch, J. Schmoll and E. Wolfslehner, acting as Agents,
- the European Commission, by S. Bourgois, C. Hermes and M. Ioan, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 June 2022,

\* Language of the case: German.

gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Article 6(1) of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (OJ 2008 L 312, p. 3).
- 2 The request has been made in proceedings between Porr Bau GmbH ('Porr Bau') and the Bezirkshauptmannschaft Graz-Umgebung (administrative authorities of the District of Graz and surrounding area) concerning the latter's finding that excavated materials discharged on cultivation areas constituted waste.

### **Legal context**

#### ***European Union law***

- 3 The essential objective of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32) ('Directive 75/442'), was, according to the third recital thereof, the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste. Directive 75/442 was repealed and replaced by Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9), which was itself repealed and replaced by Directive 2008/98.
- 4 Recitals 6, 8, 11, 22 and 29 of Directive 2008/98 state:
  - '(6) The first objective of any waste policy should be to minimise the negative effects of the generation and management of waste on human health and the environment. Waste policy should also aim at reducing the use of resources, and favour the practical application of the waste hierarchy.
  - ...
  - (8) ... Furthermore, the recovery of waste and the use of recovered materials should be encouraged in order to conserve natural resources. ...
  - ...
  - (11) The waste status of uncontaminated excavated soils and other naturally occurring material which are used on sites other than the one from which they were excavated should be considered in accordance with the definition of waste and the provisions on by-products or on the end of waste status under this Directive.
  - ...
  - (22) ... In order to specify certain aspects of the definition of waste, this Directive should clarify:

...

- when certain waste ceases to be waste, laying down end-of-waste criteria that provide a high level of environmental protection and an environmental and economic benefit; possible categories of waste for which “end-of-waste” specifications and criteria should be developed are, among others, construction and demolition waste ... For the purposes of reaching end-of-waste status, a recovery operation may be as simple as the checking of waste to verify that it fulfils the end-of-waste criteria.

...

- (29) Member States should support the use of recyclates, such as recovered paper, in line with the waste hierarchy and with the aim of a recycling society, and should not support the landfilling or incineration of such recyclates whenever possible.’

5 Chapter I of that directive, entitled ‘Subject matter, scope and definitions’, includes Articles 1 to 7 thereof.

6 Article 1 of that directive is worded as follows:

‘This Directive lays down measures to protect the environment and human health by preventing or reducing the adverse impacts of the generation and management of waste and by reducing overall impacts of resource use and improving the efficiency of such use.’

7 Article 3 of that directive, entitled ‘Definitions’, provides:

‘For the purposes of this Directive, the following definitions shall apply:

- 1. “waste” means any substance or object which the holder discards or intends or is required to discard;

...

- 15. “recovery” means any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function, in the plant or in the wider economy. Annex II sets out a non-exhaustive list of recovery operations;

- 16. “preparing for re-use” means checking, cleaning or repairing recovery operations, by which products or components of products that have become waste are prepared so that they can be re-used without any other pre-processing;

...

- 19. “disposal” means any operation which is not recovery even where the operation has as a secondary consequence the reclamation of substances or energy. Annex I sets out a non-exhaustive list of disposal operations;

...’

8 Article 4 of Directive 2008/98, entitled ‘Waste hierarchy’, is worded as follows:

‘1. The following waste hierarchy shall apply as a priority order in waste prevention and management legislation and policy:

- (a) prevention;
- (b) preparing for re-use;
- (c) recycling;
- (d) other recovery, e.g. energy recovery; and
- (e) disposal.

2. When applying the waste hierarchy referred to in paragraph 1, Member States shall take measures to encourage the options that deliver the best overall environmental outcome. ...

...’

9 Article 5 of that directive, entitled ‘By-products’, states, in paragraph 1 thereof:

‘A substance or object, resulting from a production process, the primary aim of which is not the production of that item, may be regarded as not being waste referred to in point 1 of Article 3 but as being a by-product only if the following conditions are met:

- (a) further use of the substance or object is certain;
- (b) the substance or object can be used directly without any further processing other than normal industrial practice;
- (c) the substance or object is produced as an integral part of a production process; and
- (d) further use is lawful, i.e. the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts.’

10 Under Article 6 of Directive 2008/98, headed ‘End-of-waste status’:

‘1. Certain specified waste shall cease to be waste within the meaning of point 1 of Article 3 when it has undergone a recovery, including recycling, operation and complies with specific criteria to be developed in accordance with the following conditions:

- (a) the substance or object is commonly used for specific purposes;
- (b) a market or demand exists for such a substance or object;
- (c) the substance or object fulfils the technical requirements for the specific purposes and meets the existing legislation and standards applicable to products; and

(d) the use of the substance or object will not lead to overall adverse environmental or human health impacts.

The criteria shall include limit values for pollutants where necessary and shall take into account any possible adverse environmental effects of the substance or object.

...

4. Where criteria have not been set at Community level under the procedure set out in paragraphs 1 and 2, Member States may decide case by case whether certain waste has ceased to be waste taking into account the applicable case-law. ...'

11 Article 11 of that directive, entitled 'Re-use and recycling', provides, in paragraph 2 thereof:

'In order to comply with the objectives of this Directive, and move towards a European recycling society with a high level of resource efficiency, Member States shall take the necessary measures designed to achieve the following targets:

...

(b) by 2020, the preparing for re-use, recycling and other material recovery, including backfilling operations using waste to substitute other materials, of non-hazardous construction and demolition waste excluding naturally occurring material defined in category 17 05 04 in the list of waste shall be increased to a minimum of 70% by weight.'

12 The recovery operations listed in Annex II to Directive 2008/98 include, inter alia, 'land treatment resulting in benefit to agriculture or ecological improvement'.

### *Austrian law*

13 Paragraph 2(1) of the Abfallwirtschaftsgesetz 2002 (2002 Federal Law on Waste Management) provides:

'For the purposes of this Federal Law, waste means any movable property

1. which the holder intends to discard or has discarded, or
2. whose collection, storage, transport and treatment as waste is necessary in order not to harm public interests (Paragraph 1(3)).'

14 Under Paragraph 5(1) of that law:

'Unless otherwise specified in a regulation referred to in Paragraph 5(2) or in a regulation referred to in Article 6(2) of Directive 2008/98 on waste, existing substances shall be deemed to be waste until they or substances obtained from them are used directly as a substitute for raw materials or for products obtained from primary raw materials. In the case of preparing for re-use within the meaning of point 6 of Paragraph 2(5), the end-of-waste status occurs at the end of that recovery operation.'

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

- 15 Several farmers approached Porr Bau to obtain excavated materials from it for the purpose of soil adaptation or an improvement in cultivation areas. At that time, it was not certain that that undertaking would be in a position to meet their request. That request led Porr Bau subsequently to select an appropriate construction project and to extract those materials from it. Porr Bau thus supplied the requested materials, namely uncontaminated excavated materials of quality class A1, which, under Austrian law, is the highest quality class for excavated soil. In accordance with that law, the use of those materials is appropriate for such terrain adjustments and is lawful.
- 16 On 4 May 2018, Porr Bau requested the administrative authorities of the District of Graz and surrounding area to declare that the excavated materials which it had supplied did not constitute waste and, in the alternative, that the proposed works did not constitute an activity subject to an obligation to pay a contribution in respect of contaminated sites.
- 17 By decision of 14 September 2020, those authorities found that the materials in question constituted waste, within the meaning of Paragraph 2(1) of the 2002 Federal Law on Waste Management and that their end-of-waste status had not been achieved, primarily on the ground that formal criteria laid down in the Federal Waste Management Plan had not been complied with.
- 18 Porr Bau brought an action against that decision before the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria, Austria), which is uncertain whether the excavated materials at issue must be classified as ‘waste’ within the meaning of Directive 2008/98. Furthermore, that court notes that, if those materials are to be classified as waste, it will have to examine whether end-of-waste status has been achieved.
- 19 The referring court points out that those materials have undergone a checking operation, with the result that they can be used directly. It states that, in the present case, they were used for the purpose of improving agricultural structures, that there was a need for materials, that the technical requirements have been complied with and that, in addition, there were no harmful effects on the environment or on health. Moreover, the aim of such an approach is to prevent waste and to substitute such materials for raw materials.
- 20 That court states that, under Austrian law, only two activities enable end-of-waste status to be achieved, namely, first, preparing for re-use by checking, cleaning or repairing and, second, the actual use of the materials concerned to substitute raw materials. As regards excavated materials, the applicable criteria are more restrictive, since preparing for re-use does not achieve their end-of-waste status. Thus, that court takes the view that, according to the state of the law currently in force in Austria and according to generally adopted interpretation, end-of-waste status is restricted in a manner contrary to EU law.
- 21 Although the excavated materials at issue are in the highest quality class and are appropriate, at a technical and legal level, for the improvement of the cultivation areas in question, the formal criteria laid down in the Federal Waste Management Plan, interpreted strictly, could prevent those materials from ceasing to be waste.
- 22 Accordingly, in the referring court’s view, an activity such as an improvement of cultivation areas with the aid of excavated materials, which is used to substitute raw materials and is necessary under the waste hierarchy laid down in Directive 2008/98, is prevented. That would create an

incentive, contrary to the objectives pursued by that directive, to use primary raw materials and to dispose of secondary raw materials, such as excavated materials, which are perfectly suitable for recovery.

- 23 In those circumstances the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does Article 6(1) of Directive [2008/98] preclude national legislation under which end-of-waste status is achieved only once waste or existing substances or the substances obtained from them are used directly as a substitute for raw materials or for products made from primary raw materials or they have been prepared for re-use?’

If Question 1 is answered in the negative:

- (2) Does Article 6(1) of Directive 2008/98 preclude national legislation under which end-of-waste status in respect of excavated materials can be achieved at the earliest when they serve as a substitute for raw materials or for products made from primary raw materials?

If Question 1 and/or Question 2 is/are answered in the negative:

- (3) Does Article 6(1) of Directive 2008/98 preclude national legislation under which end-of-waste status in respect of excavated materials cannot be achieved if formal criteria (in particular record-keeping and documentation obligations) which have no environmentally relevant influence on the measure carried out are not complied with or are not complied with in full, even though the excavated materials demonstrably fall below the limit values (premium) to be complied with for the specific intended use?’

### **Consideration of the questions referred**

- 24 From the outset, it should be noted that, according to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court should, where necessary, reformulate the question referred to it. The Court may also find it necessary to consider provisions of EU law which the national court has not referred to in its question (judgment of 1 August 2022, *Uniqă Asigurări*, C-267/21, EU:C:2022:614, paragraph 21 and the case-law cited).
- 25 It is also for the Court to answer the questions asked on the basis of the national legislation and the factual context defined by the referring court, which alone has jurisdiction in that regard, and to provide it with all the criteria for the interpretation of EU law which may enable it to assess whether that legislation is compatible with the provisions of the directive concerned (see, to that effect, judgment of 10 February 2022, *Philips Orăștie*, C-487/20, EU:C:2022:92, paragraph 21 and the case-law cited).

- 26 In the present case, the referring court is uncertain as to whether the excavated materials at issue in the main proceedings constitute ‘waste’ within the meaning of point 1 of Article 3 of Directive 2008/98. That court observes that one of the issues of the dispute before it is to ascertain whether uncontaminated excavated materials which, under national legislation, are in the highest quality class must be classified as ‘waste’.
- 27 The Austrian Government contends that, under Austrian law, where materials are excavated or demolished in the course of a construction project, the main purpose of the construction developer is usually to carry out that project without being hindered by those materials, with the result that they are removed from the site in question with the intention of discarding them.
- 28 Porr Bau takes the view that that is not the case here and submits that the excavated materials at issue in the main proceedings could fulfil the conditions laid down in Article 5(1) of Directive 2008/98 and thus be classified as ‘by-products’.
- 29 In the event that those materials were nevertheless to be classified as ‘waste’, the referring court states that it will be necessary to make them subject to a contribution in respect of contaminated sites and to examine whether and, if so when, the end-of-waste status of those materials has been achieved.
- 30 In that regard, it should be noted that, according to recital 11 of Directive 2008/98, the waste status of uncontaminated excavated soils and other naturally occurring material which are used on sites other than the one from which they were excavated should be considered in accordance with the definition of waste and the provisions on by-products or on the end-of-waste status under that directive.
- 31 Therefore, in order to provide a useful answer to the referring court, it must be held that, by its questions, which it is appropriate to consider together, that court asks, in essence, whether point 1 of Article 3, Article 5(1) and Article 6(1) of Directive 2008/98 must be interpreted as precluding national legislation under which uncontaminated excavated materials, which, pursuant to national law, are in the highest quality class, first, must be classified as ‘waste’ even if it were determined that those materials fall within the concept of ‘by-product’ and, second, only lose that waste status when they are used directly as a substitute and their holder satisfies the formal criteria which are irrelevant for the purposes of environmental protection.

### ***Classification of excavated materials as ‘waste’ or as a ‘by-product’***

- 32 Article 3 of Directive 2008/98 defines the concept of ‘waste’ as being any substance or object which the holder discards or intends or is required to discard.
- 33 In that regard, the Court has repeatedly held that the classification of a substance or object as ‘waste’ is to be inferred primarily from the holder’s actions and the meaning of the term ‘discard’ (judgment of 14 October 2020, *Sappi Austria Produktion and Wasserverband ‘Region Gratkorn-Gratwein’*, C-629/19, EU:C:2020:824, paragraph 42 and the case-law cited).
- 34 As regards the meaning of the term ‘discard’, it follows from the Court’s settled case-law that that term must be interpreted in the light of the aim of Directive 2008/98, which, in the words of recital 6 thereof, is to minimise the negative effects of the generation and management of waste on human health and the environment, having regard to Article 191(2) TFEU, which provides that EU policy on the environment is to aim at a high level of protection and is to be based, in



particular, on the precautionary principle and the principle that preventive action should be taken. It follows that the term ‘discard’, and therefore the concept of ‘waste’ within the meaning of point 1 of Article 3 of Directive 2008/98, cannot be interpreted restrictively (judgment of 4 July 2019, *Tronex*, C-624/17, EU:C:2019:564, paragraph 18 and the case-law cited).

- 35 More specifically, the existence of ‘waste’, within the meaning of Directive 2008/98, must be determined in the light of all the circumstances certain of which may constitute evidence that a substance or object has been discarded or of an intention or requirement to discard it within the meaning of point 1 of Article 3 of Directive 2008/98 (see, to that effect, judgment of 14 October 2020, *Sappi Austria Produktion and Wasserverband ‘Region Gratkorn-Gratwein’*, C-629/19, EU:C:2020:824, paragraph 45 and the case-law cited).
- 36 Among the circumstances that may constitute such evidence is the fact that a substance is a production or consumption residue, that is to say, a product which was not itself sought and for which special precautions must be taken if it is used owing to the environmentally hazardous nature of its composition (judgment of 14 October 2020, *Sappi Austria Produktion and Wasserverband ‘Region Gratkorn-Gratwein’*, C-629/19, EU:C:2020:824, paragraphs 46 and 47 and the case-law cited).
- 37 It is also clear from the Court’s case-law that neither the method of treatment reserved for a substance nor the use to which that substance is put determines conclusively whether or not the substance is to be classified as ‘waste’ and that the concept of ‘waste’ does not exclude substances or objects which are capable of economic re-use. The system of supervision and control established by Directive 2008/98 is intended to cover all substances and objects discarded by their owners, even if they have a commercial value and are collected on a commercial basis for recycling, reclamation or re-use (judgment of 14 October 2020, *Sappi Austria Produktion and Wasserverband ‘Region Gratkorn-Gratwein’*, C-629/19, EU:C:2020:824, paragraph 48 and the case-law cited).
- 38 In addition, particular attention must be paid to the fact that the substance or object in question is not or is no longer of any use to its holder, such that that substance or object constitutes a burden which that holder will seek to discard. If that is indeed the case, there is a risk that that holder will dispose of the substance or object in his or her possession in a way likely to cause harm to the environment, particularly by dumping it or disposing of it in an uncontrolled manner. That substance or object, because it falls within the concept of ‘waste’ within the meaning of Directive 2008/98, is subject to the provisions of that directive, which means that the recovery or disposal of that substance or object must be carried out in such a way that human health is not endangered and without using processes or methods likely to harm the environment (judgment of 14 October 2020, *Sappi Austria Produktion and Wasserverband ‘Region Gratkorn-Gratwein’*, C-629/19, EU:C:2020:824, paragraph 49 and the case-law cited).
- 39 In that regard, the degree of probability that a substance or an object will be re-used without a prior processing operation constitutes a criterion relevant to assessing whether or not they constitute waste within the meaning of Directive 2008/98. If, beyond the mere possibility of re-using the substance or object in question, there is also a financial advantage for the holder in so doing, the likelihood of such re-use is high. In such circumstances, the substance or object in question must no longer be regarded as a burden which its holder seeks to ‘discard’, but as a genuine product (see, to that effect, judgment of 14 October 2020, *Sappi Austria Produktion and Wasserverband ‘Region Gratkorn-Gratwein’*, C-629/19, EU:C:2020:824, paragraph 50 and the case-law cited).

- 40 In certain situations, a substance or an object resulting from an extraction or manufacturing process the primary aim of which is not their production may be regarded not as a residue, but as by-products, which their holder does not seek to ‘discard’, within the meaning of point 1 of Article 3 of Directive 2008/98, but which he or she intends to exploit or market on terms advantageous to him or herself in a subsequent process – including, as the case may be, in order to meet the needs of economic operators other than the producer of those substances – provided that such re-use is not a mere possibility but a certainty, without any further processing prior to re-use and as part of the continuing process of production (see, to that effect, judgment of 14 October 2020, *Sappi Austria Produktion and Wasserverband ‘Region Gratkorn-Gratwein’*, C-629/19, EU:C:2020:824, paragraph 51 and the case-law cited).
- 41 As the Court has already held, it would indeed not be justified at all to make substances or objects which the holder intends to exploit or market on economically advantageous terms, whether or not there is to be a subsequent recovery process, subject to the requirements of Directive 2008/98, which seek to ensure that recovery and disposal operations will be carried out without endangering human health and without using processes or methods which could harm the environment. However, having regard to the requirement to interpret the concept of ‘waste’ widely, it is only situations in which the re-use of the substance or object in question is not a mere possibility but a certainty that are envisaged, which it is for the referring court to ascertain, without the necessity of using any of the waste recovery processes referred to in Annex II to Directive 2008/98 prior to re-use (see, to that effect, judgment of 14 October 2020, *Sappi Austria Produktion and Wasserverband ‘Region Gratkorn-Gratwein’*, C-629/19, EU:C:2020:824, paragraph 52 and the case-law cited).
- 42 It is apparent from Article 5(1) of Directive 2008/98 that a ‘by-product’ is a substance or object resulting from a production process the primary aim of which is not to produce that substance or object and which meets a number of conditions listed in Article 5(1)(a) to (d).
- 43 As follows from that provision, a substance or object, resulting from a production process, the primary aim of which is not the production of that substance or product, may be regarded as being not ‘waste’ as referred to in point 1 of Article 3 of that directive but as a ‘by-product’ only if the following cumulative conditions are met: first, further use of the substance or object must be certain; second, it must be possible to use the substance or object directly without any further processing other than normal industrial practice; third, the substance or object must be produced as an integral part of a production process; and fourth, further use must be lawful, that is to say the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts.
- 44 A substance or object which constitutes a ‘by-product’, within the meaning of Article 5(1) of Directive 2008/98, is not regarded as being waste falling within the scope of that directive. Thus, according to that provision, the classification of ‘by-product’ and the status of ‘waste’ are mutually exclusive (see, to that effect, judgment of 14 October 2020, *Sappi Austria Produktion and Wasserverband ‘Region Gratkorn-Gratwein’*, C-629/19, EU:C:2020:824, paragraph 71).
- 45 In that regard, the Court has ruled that petroleum coke which is produced intentionally or in the course of producing other petroleum fuels in an oil refinery and is certain to be used as fuel to meet the energy needs of the refinery and those of other industries does not constitute waste within the meaning of that directive. Livestock effluent may, on the same terms, fall outside classification as ‘waste’, if it is used as soil fertiliser as part of a lawful practice of spreading on

clearly identified parcels and if its storage is limited to the needs of those spreading operations (see, to that effect, judgment of 8 September 2005, *Commission v Spain*, C-121/03, EU:C:2005:512, paragraphs 59 and 60 and the case-law cited).

- 46 It is for the referring court, which alone has jurisdiction to assess the facts of the case before it, to determine whether, in the light of the considerations set out in paragraphs 32 to 39 above, Porr Bau had in fact intended to ‘discard’ the excavated materials at issue in the main proceedings, with the result that they would constitute waste, within the meaning of point 1 of Article 3 of Directive 2008/98.
- 47 It is, in particular, for that court to determine whether those excavated materials constituted a burden which that construction undertaking sought to discard, with the result that there would be a risk that that undertaking would discard them in a manner likely to cause harm to the environment, particularly by dumping them or disposing of them in an uncontrolled manner.
- 48 That being so, it is for the Court to provide that referring court with any helpful guidance to resolve the dispute before it (see, to that effect, judgment of 14 October 2020, *Sappi Austria Produktion and Wasserverband ‘Region Gratkorn-Gratwein’*, C-629/19, EU:C:2020:824, paragraph 53 and the case-law cited).
- 49 In the present case, it is apparent from the information before the Court that, even before the excavation of the materials at issue in the main proceedings, local farmers had made an express request for the supply of such materials. After appropriate construction projects had been found, making the requested excavated materials available, that request, it is stated, led to a commitment by Porr Bau to make those excavated materials available, alongside an agreement under which that undertaking would carry out, by means of those materials, the works to adapt and improve the land and cultivation areas duly identified. Such factors, if proven which it is for the referring court to determine, do not appear to be such as to establish the intention of the construction undertaking concerned to discard those materials.
- 50 It is, therefore, necessary to examine whether the excavated materials at issue in the main proceedings must be classified as a ‘by-product’ within the meaning of Article 5(1) of Directive 2008/98.
- 51 It is for the referring court to ascertain whether all the conditions laid down in that provision, referred to in paragraph 43 above, are fulfilled.
- 52 As regards, in the first place, the condition laid down in Article 5(1)(a) of that directive, according to which further use of the substance or object is certain, it will be for the referring court to verify in the present case that the farmers concerned have made a binding commitment to Porr Bau to take delivery of the excavated materials at issue in the main proceedings in order to use them for carrying out works to adapt and improve land and cultivation areas, but also that those materials and the quantities supplied did in fact serve to carry out those works and were strictly limited for those purposes.
- 53 If the materials were not supplied immediately, it is appropriate to allow temporary storage for a reasonable period, until the works for which they are intended are carried out. As is clear from the case-law referred to in paragraph 45 above, that period of storage must, however, not exceed what

is required in order for the undertaking concerned to be able to meet its contractual obligations (see, to that effect, judgment of 3 October 2013, *Brady*, C-113/12, EU:C:2013:627, paragraph 45 and the case-law cited).

- 54 As regards, in the second place, the condition laid down in Article 5(1)(b) of Directive 2008/98 that it must be possible to use the substance or object directly without further processing other than normal industrial practice, it is apparent from the order for reference that the excavated materials at issue in the main proceedings were subject to a quality control demonstrating that they are uncontaminated materials in the highest quality class and are recognised as such under national law. It is nevertheless for the referring court to satisfy itself that those materials did not require any processing or treatment before their further use.
- 55 In the third place, regarding the condition laid down in Article 5(1)(c) of Directive 2008/98 and the question whether those materials form an integral part of Porr Bau's production process, it should be noted, as the Advocate General observed in points 41 and 47 of her Opinion, that the excavated soil is the result of one of the first steps usually undertaken in a construction operation as an economic activity, the result of which is the transformation of land.
- 56 As regards, in the fourth place, the condition that the further use of the substance or object at issue must be lawful, Article 5(1)(d) of Directive 2008/98 requires, in particular, that the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts.
- 57 It should be borne in mind in that regard that, according to the information in the order for reference, the excavated materials at issue in the main proceedings had been classified, following a quality analysis carried out before their re-use, as uncontaminated excavated materials in the highest quality class, as defined by Austrian law, in particular in the context of the Federal Waste Management Plan, which lays down specific requirements for the reduction of waste quantities, their pollutants and their harmful effects on human health and the environment. That plan, it is contended, also declares that the use of uncontaminated excavated materials in the highest quality class is suitable and authorised for land adaptation and improvement.
- 58 That use is, in principle, consistent with the objectives of Directive 2008/98. It should be noted that the use of excavated soil, in the form of building materials, in so far as such soil meets strict quality requirements, has a significant advantage for the environment because it contributes, as required by Article 11(2)(b) of that directive, to the reduction of waste, to the preservation of natural resources and to the development of a circular economy.
- 59 In addition, as the Advocate General observed in point 73 of her Opinion, it must be held that the use of excavated materials in the highest quality class, for the purpose of adapting and improving cultivation areas, makes it possible to comply with the waste hierarchy defined in Article 4 of that directive.
- 60 If, conversely, the referring court were to conclude that the excavated materials at issue in the main proceedings constitute 'waste', within the meaning of point 1 of Article 3 of Directive 2008/98, it asks whether Article 6(1) of that directive must be interpreted as precluding national legislation under which the end-of-waste status of such materials is achieved only when they are used directly as a substitute and their holder satisfies the formal criteria which are irrelevant for the purposes of environmental protection.

### *The end-of-waste status of excavated materials*

- 61 Under Article 6(1) of Directive 2008/98, certain specified waste ceases to be waste when it has undergone a recovery or recycling operation. End-of-waste status is also subject to specific criteria which must be defined in accordance with a number of conditions. First, the substance or object at issue must commonly be used for specific purposes. Second, a market or demand must exist for such a substance or object. Third, the substance or object must fulfil the technical requirements for the specific purposes and meet the existing legislation and standards applicable to products. Fourth, the use of the substance or object must not lead to overall adverse environmental or human health impacts.
- 62 The referring court observes that Paragraph 5(1) of the 2002 Federal Law on Waste Management provides that existing substances or substances obtained from them are to cease to be waste when those substances are directly used as substitutes for raw materials or products obtained from primary raw materials or at the end of their preparation for re-use.
- 63 However, as regards excavated materials, that court states that that end-of-waste status is achieved only when those materials have been used as substitutes for raw materials or for products obtained from primary raw materials.
- 64 In addition, that referring court notes, first, that recovery through preparation for re-use does not achieve end-of-waste status. Second, in order for that status to be achieved, formal requirements, such as record-keeping and documentation obligations which are irrelevant for the purposes of environmental protection, must be fulfilled, in accordance with the Federal Waste Management Plan.
- 65 It is, therefore, necessary to ascertain whether Article 6(1) of Directive 2008/98 precludes national legislation under which the end-of-waste status of uncontaminated excavated materials, which, pursuant to national law, are in the highest quality class, is achieved only when they have been used as a substitute for raw materials and after such formal requirements have been satisfied.
- 66 In the first place, it should be noted that, although the recovery operations listed in Annex II to Directive 2008/98 include 'land treatment resulting in benefit to agriculture or ecological improvement', it is apparent from recital 22 of that directive that, for the purposes of reaching end-of-waste status, a recovery operation may be as simple as the checking of waste to verify that it fulfils the end-of-waste criteria.
- 67 As the Advocate General observed in point 65 of her Opinion, that recital finds expression in point 16 of Article 3 of Directive 2008/98, which defines 'preparing for re-use' as any operation consisting in the 'checking, cleaning or repairing' of products or components of products that have become waste in order to prepare them so that they can be re-used without any other pre-processing. That same provision expressly classifies 'preparing for re-use' operations as a recovery.
- 68 Therefore, it must be held that an examination seeking to determine the status and presence of pollution or of contamination in excavated materials may be classified as a 'checking operation', covered by the concept of 'preparing for re-use', as defined in point 16 of Article 3 of Directive 2008/98. Accordingly, waste which is the subject of such a 'preparing for re-use' operation may be regarded as having undergone a recovery operation, within the meaning of Article 6(1) of that directive, if its re-use does not require any other pre-processing.

- 69 In the second place, it is for the referring court to assess whether, in the case in the main proceedings, the specific criteria defined in accordance with the conditions laid down in that Article 6(1) are complied with following the checking operation.
- 70 As regards the formal criteria laid down in the Federal Waste Management Plan to which the excavated materials at issue in the main proceedings were made subject, it should be noted that, in accordance with the second subparagraph of Article 6(1) of Directive 2008/98, the end-of-waste status criteria are to include limit values for pollutants where necessary and are to take into account any possible adverse environmental effects of the substance or object. Furthermore, Member States enjoy, within the framework laid down in Article 6(4) of that directive, discretion as regards the setting of those criteria.
- 71 Therefore, although formal criteria such as those mentioned by the referring court may prove necessary, in particular, in order to ensure the quality and safety of the substance at issue, they must be set in such a way as to attain their objectives without undermining the achievement of the objectives of Directive 2008/98.
- 72 In the present case, it is apparent from the file before the Court that, according to the decision referred to in paragraph 17 above, the assessment that the end-of-waste status of the excavated materials at issue in the main proceedings had not been achieved was essentially attributable to non-compliance with the formal criteria which are irrelevant for the purposes of environmental protection.
- 73 The objectives pursued by Directive 2008/98 would be likely to be disregarded if, notwithstanding the fact that the uncontaminated excavated materials in the highest quality class comply with the specific criteria defined in accordance with the conditions laid down in Article 6(1) of that directive, those materials – the properties of which serve to improve agricultural structures – were not regarded as having lost their waste status following a quality control making it possible to ensure that their use was safe for the environment or human health.
- 74 If, as the referring court points out, the re-use of such excavated materials were hindered by formal criteria which are irrelevant for the purposes of environmental protection, those criteria would have to be regarded as running counter to the objectives pursued by Directive 2008/98, which, as is apparent from recitals 6, 8 and 29 of that directive, consist in encouraging the application of the waste hierarchy provided for in Article 4 of that directive as well as the recovery of waste and the use of recovered materials in order to conserve natural resources and to enable the development of a circular economy. Such measures would, as the case may be, undermine the effectiveness of that directive.
- 75 It cannot be accepted that such formal criteria have the effect of undermining the attainment of the objectives of Directive 2008/98. It is for the referring court, which alone has jurisdiction to interpret the provisions of its national law, to examine whether that is so in the present case.
- 76 It follows from those considerations that, if the excavated materials at issue in the main proceedings were the subject of a recovery operation and satisfy all the specific criteria defined in accordance with the conditions laid down in Article 6(1)(a) to (d) of Directive 2008/98, which it is for the referring court to ascertain, it must be held that the end-of-waste status of those materials has been achieved.

- 77 In the light of all the foregoing considerations, the answer to the questions referred is that point 1 of Article 3 and Article 6(1) of Directive 2008/98 must be interpreted as precluding national legislation under which uncontaminated excavated materials, which, pursuant to national law, are in the highest quality class:
- must be classified as ‘waste’ where their holder neither intends nor is required to discard them and those materials meet the conditions laid down in Article 5(1) of that directive for being classified as ‘by-products’, and
  - only lose that waste status when they are used directly as a substitute and their holder has satisfied the formal criteria which are irrelevant for the purposes of environmental protection, if those criteria have the effect of undermining the attainment of the objectives of that directive.

### **Costs**

- 78 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

**Point 1 of Article 3 and Article 6(1) of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives,**

**must be interpreted as precluding national legislation under which uncontaminated excavated materials, which, pursuant to national law, are in the highest quality class,**

- **must be classified as ‘waste’ where their holder neither intends nor is required to discard them and those materials meet the conditions laid down in Article 5(1) of that directive for being classified as ‘by-products’, and**
- **only lose that waste status when they are used directly as a substitute and their holder has satisfied the formal criteria which are irrelevant for the purposes of environmental protection, if those criteria have the effect of undermining the attainment of the objectives of that directive.**

[Signatures]